least lost to the commission should a use be declared private, while if held public the aggrieved party has an appeal to the courts.[31] But it is submitted that the real difficulty is the failure on the part of the commissions to comprehend the basic principles underlying governmental control of businesses and the failure to appreciate and respect constitutional limitations.

RECENT CASES

AGENCY — SCOPE OF EMPLOYMENT — TEST. — It was the duty of the defendant's automobile driver to take a certain infirm employee of the defendant home each evening from work. One evening on arriving home this employee directed the driver to take his wife's dressmaker to her home which was in the direction of but far beyond the garage. On this mission, and before reaching the garage, and on the route that the driver would have taken in the course of his employment in driving the car to the garage, the car ran into and injured the plaintiff who was using due care. *Held*, the defendant is not liable. *Clawson* v. *Pierce Arrow Motor Car Co.*, 170 N. Y. Supp. 310 (App. Div.).

The principal case raises the question of whether the servant was within the scope of his employment when the injury occurred in doing, from the objective point of view, the very act authorized, and when the servant was innocent of any determination to disobey the master. The exact facts of the principal case are novel, but in a similar case the subjective test was held decisive. *Thompson* v. *Aultman and Taylor*, 96 Kans. 259, 150 Pac. 587. This view accords with the principles enunciated by leading cases which consider the test to be whether the servant was merely deviating or on an independent journey. *Joel* v. *Morison*, 6 C. & P. 501; *Mitchell* v. *Crassweller*, 13 C. B. 237. This in effect makes the test whether what the servant was doing was merely a poor or roundabout way of doing the master's work or no way at all. See *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526, 542–43. To determine this, modern cases have considered along with the objective test the intent of the servant. *Fleischer* v. *Durgen*, 207 Mass. 435, 93 N. E. 801; *Provo* v. *Conrad*, 130 Minn. 412, 153 N. W. 753; *Colewell* v. *Aetna Bottle & Stopper Co.*, 33 R. I. 531, 82 Atl. 388; *Healey* v. *Cockrill*, 202 S. W. 229 (Ark.); *Dockweiter* v. *American Piano Co.*, 94 Misc. Rep. 712, 160 N. Y. Supp. 270; *Jones* v. *Strickland*, 77 So. 562 (Ala.); *Trombley* v. *Stevens-Duryea Co.*, 206 Mass. 516, 92 N. E. 764; *Nelson Business College Co.* v. *Lloyd*, 60 Ohio St. 448, 54 N. E. 471; *Davies* v. *Anglo-American Tire Co.*, 145 N. Y. Supp. 341. The principal case is interesting in that it decides that the whole journey from the time of taking the dressmaker in the car is independent and not a roundabout way of performing the master's work, although objectively there had been at the time of the accident not even a deviation.

CONFLICT OF LAWS — ENFORCEMENT OF FOREIGN STATUTES — PENAL NATURE OF DEATH STATUTE. — For injuries resulting in death a Massachusetts statute gave damages of $500 to $10,000, depending upon "the degree of culpability" of the person causing the same. (R. L. c. 171, § 2, as amended by L. 1907, c. 375). The administrator of the deceased sues in New York under this statute. *Held*, he can recover. *Loucks* v. *Standard Oil Co. of N. Y.*, 120 N. W. 198 (N. Y.).

Suits for torts committed in one state may be brought in another unless public policy forbids. See 31 HARV. L. REV. 1161. But penal statutes will not be so enforced. *The Antelope*, 10 Wheat. (U. S.) 66, 123. In the principal

[31] See Salt Lake City *v.* Utah Light & Traction Co., 173 Pac. 556 (Utah) (1918).

case a recovery without showing special injury, a minimum lump sum, and increased damages dependent upon culpability look toward a penalty. But courts divide as to whether the statute is penal within the meaning of private international law. Some confine penal to the strictly criminal aspect or to where its characteristics, punishment, etc., predominate. *Huntington* v. *Attrill*, 146 U. S. 657, 13 Sup. Ct. Rep. 224; *Strait* v. *Yazoo, etc. R. Co.*, 209 Fed. 157, 126 C. C. A. 105; *Hill* v. *Boston, etc. R. Co.*, 77 N. H. 151, 89 Atl. 482; *Malloy* v. *Amer. Hide & Leather Co.*, 148 Fed. 482; *Knight* v. *Ry. Co.*, 108 Pa. 250; *Louisville, etc. R. Co.* v. *McCaskell*, 98 Miss. 20, 53 So. 348; *Gullege Bros. Lumber Co.* v. *Wenatchee Lane Co.*, 122 Minn. 266, 142 N. W. 305; *Chesapeake, etc. R. Co.* v. *Amer. Exch. Bank*, 92 Va. 495, 23 S. E. 935; *Whitlow* v. *Nashville R. R. Co.*, 114 Tenn. 344, 84 S. W. 618; *Boyce* v. *Wabash R. Co.*, 63 Ia. 70, 18 N. W. 673; *San Louis Obispo* v. *Hendricks*, 71 Cal. 242, 11 Pac. 682. Others construe any statute penal which is not predominatingly compensatory. *Christilly* v. *Warner*, 87 Conn. 461, 88 Atl. 711; *Adams* v. *Fitchburg R. R. Co.*, 67 Vt. 76, 30 Atl. 687; *Raisor* v. *V. C. & A. Ry. Co.*, 215 Ill. 47, 74 N. E. 69; *Dale* v. *Atchison, etc. R. Co.*, 57 Kans. 601, 47 Pac. 521; but see *Battese* v. *Union Pac. R. Co.*, 170 Pac. 811; *O'Reilly* v. *N. Y. & N. E. R. Co.*, 16 R. I. 388, 17 Atl. 906; but see *Gardner* v. *N. Y. & N. E. Ry. Co.*, 17 R. I. 790, 24 Atl. 831; *Plymouth First Nat. Bank* v. *Price*, 33 Md. 487. The act in question has been variously construed. See cases cited *supra*. It is submitted that the principal reasons sustaining the latter view are formal rather than substantial. That the only action for death at common law was criminal has made difficult the recognition of the above recovery as a tort action. See 21 HARV. L. REV. 383, 386; but despite penal earmarks its essence is tort compensation as the historical analysis by the court shows. *Loucks* v. *Standard Oil Co. of N. Y.*, *supra*, 199. The contention that it is against the public policy of the trial state more often appears as an excuse than a reason. It has been argued that the trial state is bound by the highest decision of the enacting state; but this is not so, since the matter is purely one of the law of the forum. See *Huntington* v. *Attrill*, *supra*, 669, 683. See also WESTLAKE, PRIVATE INTERNATIONAL LAW, 5 ed., 318 *b*. Note also that while some state courts have assumed that Massachusetts has settled that this is a penal statute, the Massachusetts court leaves the matter open. *Boott Mills* v. *B. & R. R. Co.*, 218 Mass. 582, 592, 106 N. E. 680.

CONSTITUTIONAL LAW — DUE PROCESS — PROHIBITION OF MAKING HANDING OVER TIPS A CONDITION OF EMPLOYMENT. — A state statute made it a misdemeanor for an employer to require his employee to hand over tips in consideration, or as a condition, of employment. *Held*, that the statute was in violation of the due process clause of the Fourteenth Amendment. *Ex parte Farb*, 174 Pac. 320 (Cal.).

As under the present statute the employer and employee cannot contract freely, it must be justified under the police power. *Bailey* v. *Alabama*, 219 U. S. 219, 31 Sup. Ct. Rep. 145. See 28 HARV. L. REV. 496. To keep the public in ignorance, when knowledge would undoubtedly cause tipping to cease, is fraud, and as such subject to regulation or prohibition. *Plumbley* v. *Mass.*, 155 U. S. 461, 15 Sup. Ct. Rep. 154; *Powell* v. *Penn.*, 127 U. S. 678; *Burdick* v. *People*, 149 Ill. 600, 36 N. E. 948. See 31 HARV. L. REV. 490. Such legislation, if it tends to the result desired, will be overthrown, only when utterly unreasonable. *Otis* v. *Parker*, 187 U. S. 606, 23 Sup. Ct. Rep. 168; *McLean* v. *Arkansas*, 211 U. S. 539, 547, 29 Sup. Ct. Rep. 206, 208; *Rast* v. *Denman*, 240 U. S. 342, 357, 36 Sup. Ct. Rep. 370, 374. However, the principal case presents a new criterion, namely, reasonable regulation, where practicable, is the only method by which incidental evils of legitimate business may be overcome. Under this rule it seems that a different result would have been reached in the following cases. *Otis* v. *Parker*, *supra*; *Powell* v. *Penn.*,